(3)

No. 87-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALAN MCSURELY,

Petitioner,

—v.—

GEORGE W. HUTCHISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF
IN OPPOSITION

1) At page 7 of his response the Solicitor General says that "there is no need for the court to address it [the issue in this case] now" (emphasis supplied).

The inference is clear that even the Solicitor General acknowledges that at some future time it may be appropriate for the Court to address the issue in this case. That certainly appears likely considering that the lower court decision reflects a very sharp departure from Carlson v. Green, 446 U.S. 26 (1980); and that the Court has in the last three years, rendered three decisions seeking to delineate rules for the application of statutes of limitation - whether they be State or Federal, Wilson v. Garcia, 471 U.S. 261 (1983); Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987); Agency

Holding Corp. v. Malley Duff and Associates, 107 S.Ct. 2759, but has left a gaping hole upon that issue in the context of a Bivens case. Since it appears that the issue in this case cannot long escape decision by the court, why should the court not take the case now? The issues are clear, sharp and fully developed. Continued litigation at the level of the Courts of Appeal will add nothing to the development of the issues as they now appear in this case. The Sixth and Second circuits appear to have taken one view and the Ninth Circuit seems to be leaning in the other. Why should the bench and the bar be deprived of a clear direction by the Court?

2) The Solicitor General argues that the Ninth Circuit in Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) did not really decide but in

fact, merely skirted the issue as to whether Garcia v. Wilson should be applied to Bivens type actions. Whether or not that is so, the Ninth Circuit indicated its negative reactions to doing so by strongly relying on the non-retroactivity of any such rule - a position that the Sixth Circuit rejected in this case.

3) The Solicitor General's position conflicts with the careful judicial process of this court. In Garcia this Court established that 42 U.S.C. §1983 was a response to the campaign of violence formulated by the Klan. Therefore, it was appropriate to apply a uniform rule of statutes of limitation generally related to violent torts - i.e., personal injury actions. The Solicitor General argues that "Section 1983 actions against state officials and Bivens actions against

federal officials are closely analogous remedies" (Response p.5). Of course they are analogous remedies to the extent that they both allow damage actions. But the question is not the similarity of the remedies; it is rather the similarity - or not - of the causes of actions which form the grist of Bivens actions as contrasted with 42 U.S.C. §1983 actions.

The Court in Garcia was satisfied that application of limitation rules related to personal injury actions was fairly reasonable as to 42 U.S.C. §1983 actions. When the court does ultimately consider the issues in this case it will be required to make an evaluation of the proper standard to be applied to Bivens cases. It will do so not by assuming the conclusion without any factual support as has the Solicitor General, but by a careful

scrutiny of the facts showing the content of Bivens actions. If the court should grant this petition, it is the intention of the petitioner to make a careful analysis of all Bivens type litigation and the underlying judicial reasoning that gave rise to the remedy so that the court will have a sound factual basis upon which it may decide a) whether it should apply a uniform federal rule for a statute of limitation as it did in Agency Holding v. Malley Duff Associates or b) whether it should apply varying state rules. And if the court should choose the latter course, it will face and decide questions as to the source of state rules to be applied to Bivens type actions, e.g., personal injury limitation cases as decided by the Sixth Circuit, or a right created by statute as decided by the District

Court in its pre-Garcia decision in this case (Pet. 30-a-329).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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